

Submission of Federal Rules Under the Congressional Review Act

☐ President of the Senate

☒ Speaker of the House of Representatives

☐ GAO

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Please fill the circles electronically or with black pen or #2 pencil.

1. Name of Department or Agency

Department of Defense

2. Subdivision or Office

OUSD(AT&L)DPAP(DAR)

3. Rule Title

Indian Incentive Program

4. Rule Identification Number (RIN) or Other Unique Identifier (if applicable)
DFARS Case 2002-D033

5. Major Rule ☐ Non-major Rule ☒

6. Final Rule ☒ Other ☐

7. With respect to this rule, did your agency solicit public comments? Yes ☒ No ☐ N/A ☐

8. Priority of Regulation (fill in one)

☒ Economically Significant; or
Significant; or
Substantive, Nonsignificant

☐ Routine and Frequent or
Informational/Administrative/Other
(Do not complete the other side of this form
if filled in above.)

9. Effective Date (if applicable) September 16, 2004 (estimated)

10. Concise Summary of Rule (fill in one or both) attached ☒ stated in rule ☐

Submitted by: [Signature] (signature)

SEP 13 2004

Name: Deidre A. Lee

Title: Director, Defense Procurement and Acquisition Policy

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For Congressional Use Only:

Date Received: _____

Committee of Jurisdiction: _____

	Yes	No	N/A
A. With respect to this rule, did your agency prepare an analysis of costs and benefits?	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
B. With respect to this rule, at the final rulemaking stage, did your agency			
1. certify that the rule would not have a significant impact on a substantial number of small entities under 5 U.S.C. § 605(b)?	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
2. prepare a final Regulatory Flexibility Analysis under 5 U.S.C. § 604(a)?	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
C. With respect to this rule, did your agency prepare a written statement under § 202 of the Unfunded Mandates Reform Act of 1995?	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
D. With respect to this rule, did your agency prepare an Environmental Assessment or an Environmental Impact Statement under the National Environmental Policy Act (NEPA)?	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
E. Does this rule contain a collection of information requiring OMB approval under the Paperwork Reduction Act of 1995?	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
F. Did you discuss any of the following in the preamble to this rule?	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
• E.O. 12612, Federalism	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
• E.O. 12630, Government Actions and Interference with Constitutionally Protected Property Rights	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
• E.O. 12866, Regulatory Planning and Review	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
• E.O. 12875, Enhancing the Intergovernmental Partnership	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
• E.O. 12988, Civil Justice Reform	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
• E.O. 13045, Protection of Children from Environmental Health Risks and Safety Risks	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
• Other statutes or executive orders discussed in the preamble concerning the rulemaking process (please specify)			

(Billing Code 5001-08-P)

DEPARTMENT OF DEFENSE

48 CFR Parts 226 and 252

[DFARS Case 2002-D033]

Defense Federal Acquisition Regulation Supplement;

Indian Incentive Program

AGENCY: Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD has adopted as final, with changes, an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement DoD Appropriations Act provisions pertaining to the Indian Incentive Program. The Program permits incentive payments to contractors, and subcontractors at any tier, that use Indian organizations, Indian-owned economic enterprises, and Native Hawaiian small business concerns as subcontractors.

EFFECTIVE DATE: *[Date of publication in Federal Register]*.

FOR FURTHER INFORMATION CONTACT: Ms. Donna Hairston-Benford, Defense Acquisition Regulations Council, OUSD(AT&L)DPAP(DAR), IMD 3C132, 3062 Defense Pentagon, Washington, DC 20301-3062.

Telephone (703) 602-0289; facsimile (703) 602-0350. Please cite DFARS Case 2002-D033.

SUPPLEMENTARY INFORMATION:

A. Background

DoD published an interim rule at 68 FR 56561 on October 1,

2003, to implement Section 8021 of the DoD Appropriations Act for Fiscal Year 2003 (Public Law 107-248). Section 8021 revised the criteria for application of the Indian Incentive Program by establishing a >\$500,000 threshold for contracts and subcontracts under which incentives may be paid; by authorizing incentive payments for subcontracts awarded to Native Hawaiian small business concerns; and by adding contracts and subcontracts for commercial items to the Program. Section 8021 of the DoD Appropriations Act for Fiscal Year 2004 (Public Law 108-87) and Section 8021 of the DoD Appropriations Act for Fiscal Year 2005 (Public Law 108-287) contain similar provisions.

Fourteen sources submitted comments on the interim rule. A discussion of the comments is provided below. Differences between the interim and final rules are addressed in the response to Comments 1 and 6.

1. Comment: Revise requirements for use of the Indian incentive clause at DFARS 252.226-7001, to require inclusion of the clause in all contracts and subcontracts exceeding \$500,000, instead of the present requirement for inclusion of the clause in contracts and subcontracts exceeding \$500,000 when "subcontracting opportunities may exist." This change would eliminate the possibility that a subcontracting opportunity might be overlooked.

DoD Response: Concur. The recommended change has been made in the final rule at 226.104 and 252.226-7001(g).

2. Comment: The rule should include the statutory requirement for inclusion of the incentive clause in subcontracts exceeding \$500,000 at any tier.

DoD Response: The rule requires inclusion of the clause, including the flowdown requirement, in all subcontracts exceeding \$500,000. This covers all subcontracts exceeding \$500,000 at all tiers.

3. Comment: The \$500,000 threshold for inclusion of the incentive clause in contracts and subcontracts is restrictive and should be lowered to \$100,000 or less.

DoD Response: Do not concur. The \$500,000 threshold is consistent with the Appropriations Act provisions.

4. Comment: With regard to the requirement for subcontracted commercial items to be produced or manufactured in whole or in part by a Native firm, the phrase "produced or manufactured in whole or in part" should be clarified. Solutions offered were: Use of the manufacturing standards established by the North American Industry Classification System (NAICS) codes; use of a percentage such as that contained in the nonmanufacturer rule at FAR 19.102(f)(2); or a reference to the Small Business Administration regulations at 13 CFR 121.406.

DoD Response: Do not concur. Placing such a restriction on the eligibility of a subcontract awarded to a Native firm would be without statutory basis.

5. Comment: Can an Indian business provide a non-

commercial item as a reseller for the actual manufacturer?

DoD Response: Neither the Appropriations Act provisions nor the DFARS rule place any manufacturing conditions on non-commercial items subcontracted under the Program.

6. Comment: The rule should clarify that Alaska Native Corporations are eligible for participation in Program.

DoD Response: The rule already provides for participation of Alaska Native Corporations, through the definitions of "Indian" and "Indian-owned economic enterprise" in the clause at 252.226-7001. Minor changes have been made to the definition of "Indian" to clarify this point.

7. Comment: Are businesses owned by individual Federally recognized American Indians eligible for participation in the Program, as well as those businesses owned by Federally recognized tribes and organizations?

DoD Response: Yes. The definitions at 252.226-7001 provide for participation by Indian-owned businesses that are individually owned or tribally owned.

8. Comment: The Indian Incentive Program should also be applied to DoD Family Housing Privatization contracts. Presently, the incentive clause cannot be included in these contracts, because the privatization contracts are not considered DoD contracts.

DoD Response: This comment is outside the scope of the DFARS rule. Therefore, no change has been made to the rule as a

result of this comment.

This rule was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

B. Regulatory Flexibility Act

This rule may have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. DoD has prepared a final regulatory flexibility analysis. A copy of the analysis may be obtained from the point of contact specified herein. The analysis is summarized as follows:

This rule amends the DFARS to implement Section 8021 of the DoD Appropriations Act for Fiscal Year 2003 (Public Law 107-248), Section 8021 of the DoD Appropriations Act for Fiscal Year 2004 (Public Law 108-87), and Section 8021 of the DoD Appropriations Act for Fiscal Year 2005 (Public Law 108-287) pertaining to the Indian Incentive Program. The Program permits incentive payments to contractors, and subcontractors at any tier, that use Indian organizations, Indian-owned economic enterprises, and Native Hawaiian small business concerns as subcontractors. DoD received no comments on the initial regulatory flexibility analysis. However, as a result of comments received on the interim rule, the final rule includes a change that prescribes use of the Indian incentive clause at DFARS 252.226-7001 in all contracts and subcontracts exceeding \$500,000, rather than in only those exceeding \$500,000 for which subcontracting opportunities are

deemed to exist at the time of award of the contract or subcontract. The rule requires that maximum practicable opportunity be provided for Indian organizations, Indian-owned economic enterprises, and Native Hawaiian small business concerns to receive subcontract awards; and provides that a contractor or subcontractor that awards a subcontract to such an entity may receive an incentive payment of 5 percent of the amount of the subcontract. There are no practical alternatives that would accomplish the objectives of the applicable statutes.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the rule does not impose any information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Parts 226 and 252

Government procurement.

Michele P. Peterson,

Executive Editor,

Defense Acquisition Regulations Council.

Accordingly, the interim rule amending 48 CFR Parts 226 and 252 which was published at 68 FR 56561 on October 1, 2003, is adopted as a final rule with the following changes:

1. The authority citation for 48 CFR Parts 226 and 252 continues to read as follows:

Authority: 41 U.S.C. 421 and 48 CFR Chapter 1.

PART 226—OTHER SOCIOECONOMIC PROGRAMS

226.104 [Amended]

2. Section 226.104 is amended by removing the phrase "for which subcontracting opportunities may exist".

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

3. Section 252.212-7001 is amended as follows:

- a. By revising the clause date to read "(SEP 2004)"; and
- b. In paragraph (b) by revising entry "252.226-7001" to

read as follows:

252.212-7001 Contract Terms and Conditions Required to Implement Statutes or Executive Orders Applicable to Defense Acquisitions of Commercial Items.

* * * * *

(b) * * *

____ 252.226-7001 Utilization of Indian Organizations,
Indian-Owned Economic Enterprises, and
Native Hawaiian Small Business Concerns
(SEP 2004) (Section 8021 of Public Law
107-248 and similar sections in subsequent
DoD appropriations acts).

* * * * *

4. Section 252.226-7001 is amended as follows:

- a. By revising the clause date to read "(SEP 2004)";
- b. In paragraph (a) by revising the definition of

"Indian"; and

c. By revising paragraph (g) to read as follows:

252.226-7001 Utilization of Indian Organizations, Indian-Owned Economic Enterprises, and Native Hawaiian Small Business Concerns.

* * * * *

(a) * * *

Indian means--

(1) Any person who is a member of any Indian tribe, band, group, pueblo, or community that is recognized by the Federal Government as eligible for services from the Bureau of Indian Affairs (BIA) in accordance with 25 U.S.C. 1452(c); and

(2) Any "Native" as defined in the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.).

* * * * *

(g) The Contractor shall insert the substance of this clause, including this paragraph (g), in all subcontracts exceeding \$500,000.